

# Chief Psychiatrist 's guideline:

Electronic communication and privacy in designated mental health services



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# Introduction

In accordance with s. 121(1)(a) of the *Mental Health Act 2014*, the Chief Psychiatrist's functions include providing standards, guidelines and practice directions to mental health service providers.

## Purpose

This guideline has been produced to help designated mental health services to develop their own policies and guidelines relating to the use of electronic communication devices. The principles presented in this guideline are informed by, but not limited to, the following legislative frameworks:

- *Charter of Human Rights and Responsibilities Act 2001* (Appendix 1)
- *Mental Health Act 2014* (Appendix 2)
- *Health Records Act 2001* (Appendix 3)
- *Surveillance Devices Act 1999* (Appendix 4).

### Key messages

- Every patient has the right to enjoy his or her human rights, without discrimination (*Charter of Human Rights and Responsibilities Act*).
- Patients have the right to privately communicate information of all kinds (including audio and visual) and to communicate lawfully with any person (*Mental Health Act*).
- A patient must not be deprived of his or her property other than in accordance with law (*Charter of Human Rights and Responsibilities Act*).
- An authorised psychiatrist may direct staff, in writing, to restrict communication if this is needed to protect health, safety and wellbeing (conditions and exceptions are provided in the *Mental Health Act*).
- If a patient's right to communicate is restricted, this must be effected in the least restrictive way possible, within the context of a patient-centred, recovery-focused approach, with due consideration to alternative options to communicate. Restrictions needs to be reviewed regularly and ceased immediately when no longer necessary (*Mental Health Act*).
- Recording of 'health information' using an electronic communication device is subject to health privacy principles (*Health Records Act* and *Surveillance Devices Act*).

## Terminology

For the purpose of this guideline, electronic communication devices include:

- mobile phones
- tablet devices
- computers.

People admitted to inpatient units on a compulsory basis are often termed 'patients'. Those receiving treatment voluntarily are often termed 'consumers'. The term 'patient' is used throughout this document to refer to people in both categories for consistency.



# Guiding principles for electronic communication and privacy

Designated mental health services should develop clear internal policies and guidelines for patient use of electronic communication devices. These will help to ensure staff are informed of patients' rights to communicate in a manner that respects the right of other staff and patients to privacy. Best practice is patient-centred and recovery-focused, with the least restrictive approach possible and where reasonable alternatives are offered and supported.

Policies and guidelines for electronic communication should include the following at a minimum:

- the purpose of the policy or guideline in the context of patient-centred, recovery-focused care
- a patient's right to communicate privately and lawfully with any person
- the benefits and risks of using electronic communication devices to mental health across the lifespan
- conditions that need to be met when restricting communication, including providing alternative options
- monitoring and ceasing restrictions on communication immediately when no longer necessary
- secure storage and registration of personal electronic communication devices
- maintaining the privacy of others
- prohibition on publishing private conversations and activity
- expressed and implied consent to recording private activity and conversations
- inclusions and exceptions to the above
- roles and responsibilities of staff in supporting patients' rights regarding communication and privacy.

Policies and guidelines need to align with relevant legislation that applies to communication and privacy. General guidance is provided within this guideline; however, designated mental health services are advised to seek their own legal advice when developing policies and guidelines.

# Electronic communication and recovery

From the perspective of the individual being treated for mental illness, the use of electronic communication devices can promote recovery, as defined within the *National Standards for Mental Health Services* (2010). In this context recovery means gaining and retaining hope, meaning and purpose in life, understanding one's abilities and disabilities, engaging in an active life, personal autonomy, social identity and maintaining a positive sense of self.

Patients' rights to seek, receive and share information, to own electronic communication devices and to be considered equal are protected by the Charter of Human Rights and Responsibilities Act (see Appendix 1).

## Examples of ways that electronic communication devices can promote recovery

- To stay connected to friends, family and other members of a personal support network, including other patients and patient support networks.
- To use features of the device for therapeutic benefit and/or recreation (for example, listening to music, playing games, using self-help apps and watching videos).
- To access legal rights such as legal representation, advocacy, making a complaint, seeking a second opinion, contacting a nominated person or other rights under the Mental Health Act.
- To find out more about mental health problems/diagnoses, recovery, treatments, coping skills, rights information and service standards.
- To seek out support services and options following discharge.
- To address day-to-day needs (paying bills, reading correspondence and communicating with Centrelink or employers).
- To maintain a sense of normalcy/routine (using social media is part of many people's routine) and dignity (almost everyone uses these devices).

## Mental Health Act Principles (s. 11)

Persons receiving mental health services should:

- be provided assessment and treatment in the least restrictive way possible
- be involved in all decisions and be supported to make or participate in those decisions, and that their views and preferences should be respected
- be allowed to make decisions that involve a degree of risk
- have their rights, dignity and autonomy respected and promoted
- be provided with services that aim to bring about the best possible therapeutic outcomes and promote recovery and full participation in community life.

Children and young persons receiving mental health services should have their best interests recognised and promoted as a primary consideration.

Patient-centred, recovery-focused decisions about electronic communication devices can be documented in the care plan.

# Patients' rights

A patient's right to communicate is further protected under the Mental Health Act (see Appendix 2).

## Restrictions to the right to communicate

Decisions about communication need to encompass the Mental Health Act principles, especially with regard to promoting a person's recovery, providing treatment in the least restrictive way possible, recognising people's individual needs and the role of parents, guardians, families and carers.

Removing a person's electronic device can have an adverse impact on wellbeing, recovery, connection with family and friends and their engagement with treatment. Therefore, in the presence of restrictions, due consideration needs to be given to meeting the patient's communication requirements by offering alternative options. There are particular considerations for ensuring the safety and wellbeing of children and young people using electronic communication. More information on e-safety can be found at the end of this document.

In the event that the health, safety and wellbeing of an inpatient or another person is at risk, under the Mental Health Act authorised psychiatrists or a delegate (s. 151) may direct staff, in writing, to restrict an inpatient's right to communicate if they are satisfied this is reasonably necessary (see Appendix 2).

When restricting the right to communicate, an authorised psychiatrist or delegate (s. 151) must:

- give the direction in writing
- ensure the restrictions are the least restrictive possible
- review his/her decision on a regular basis
- cease the restriction immediately when it is no longer necessary
- take reasonable steps to inform the inpatient and the following others in relation to the inpatient about the restriction and the reasons for it:
  - the nominated person
  - a guardian
  - a carer
  - a parent (if the patient is under the age of 16 years)
  - the secretary to the Department of Health and Human Services if the inpatient is the subject of a family reunification order or care by Secretary order.

A direction cannot be given that restricts an inpatient's right to communicate with:

- a legal representative
- the Chief Psychiatrist
- the Mental Health Complaints Commissioner
- the Mental Health Tribunal
- a community visitor, or
- a prescribed person or body (the Independent Mental Health Advocacy service is a prescribed body for the purposes of s. 16(2)(f) of the Mental Health Act).

### **Examples of applying the Mental Health Act principles in practice**

- If the policy or relevant legislation has been breached, causing potential harm, a dialogue needs to occur with the patient to explore the circumstances. Seek agreement on how the requirements of the policy or legislation can be met.
- A discussion about restricting the use of electronic devices may be appropriate if the policy or legislation is repeatedly breached in a manner that causes harm, despite agreement on appropriate use.
- Restrictions to communication may occur when there are potential or actual breaches to privacy of both patients and staff and the legislative requirements in Mental Health Act (s.16) are met. 'Health information' is protected by the Health Privacy Principles within the Health Records Act (see Appendix 3).
- A communication device can only be taken away from an inpatient without their agreement where the requirements of the Mental Health Act are met.

# Electronic devices and privacy

Recording a private activity or conversation – for example, about health information – using a ‘surveillance device’ may contravene the Surveillance Devices Act. Contemporary electronic communication devices typically have the capacity to record audio and visual information and, as such, these devices can be considered ‘surveillance devices’ under the Act (see Appendix 4).

## Unreasonable restrictions

### Examples when it would generally not be reasonable to restrict use of electronic communication devices

- A first time breach of the communication policy – especially if there was no prior explanation of the policy and expectations, or no first warning/advice given.
- Taking photos of the facility if other patients and staff are not in the photo (it is reasonable to take photographs of a mental health facility; these are public services and other patients in the hospital can do this).
- Making online purchases (unless there were risks such as accruing significant debt).
- Concern that a patient may use the device for unlawful or harmful reasons but has not actually done so (pre-emptive management of risk).
- Because a patient is making complaints, seeking legal advice, seeking advocacy or expressing anger at the service.
- Because a patient is writing about their experience of being unwell, or of being in hospital, on social media (unless this contravenes the Surveillance Devices Act or Health Records Act). This is an increasingly common and often helpful strategy for people to connect with their community, and to activate their support networks.
- Because a patient is writing about unusual beliefs/delusions on social media (unless this contravenes the Surveillance Devices Act, Health Records Act or otherwise poses a high risk of harm to the person or others).
- Because a patient is researching their treatment, diagnosis, the service or any other issue related to their admission.
- For any punitive reason.

## Reasonable restrictions

Restrictions to communication **may** be considered in the following circumstances.

Note: These examples are not exhaustive and every situation needs be tailored to individual circumstances and preferences.

### Examples when it may be reasonable to restrict use of electronic communication devices

- Unlawful use of a device (for example, stalking and harassment).
- Breach of another person’s privacy, for example:
  - audio or video recording a conversation between a patient and their mental health clinician about their care plan without the express or implied consent of the patient and the clinician and when this conversation is taking place in a private area where it would be reasonable to expect not to be overheard (this contravenes the Surveillance Devices Act)
  - audio or video recording a patient and posting the recording on social media such as YouTube without the express or implied consent of all parties captured in the recording (this also contravenes the Surveillance Devices Act).
- Patient request for restriction in an advance statement (the patient may have personal reasons for not wanting their phone).

- Patient agreement following a discussion about risk of harm, such as past instances of accruing large debts while unwell (this kind of restriction should have patient discussion and consent, be part of a treatment plan, may involve carers/family, and should always be based on current risks, not past history).
- Extreme disinhibited behaviour that may have serious long-term repercussions for the person (for example, posting naked photographs online or making extremely large online purchases).

From time to time mental health services may receive requests from people external to the unit to restrict a patient's mobile phone use because the individual is feeling threatened, harassed or otherwise unsafe. For example, the person might be making frequent calls to family members, carers or the police. Strategies are suggested below.

1. Determine whether the calls are unlawful (for example, stalking, harassment, threats of violence) or lawful but upsetting.
2. In accordance with the Mental Health Act, the authorised psychiatrist is the only person who can direct staff to restrict communication. The conditions that need to be met when restricting communication are provided in the Mental Health Act. The authorised psychiatrist may consider information and evidence provided by others when arriving at the decision to restrict communication and whether further action is needed in the event that the circumstances leading up to the restriction were unlawful.

#### **Frequent calls to a family member or carer resulting in the person requesting a restriction in communication**

In the event that there was no unlawful act leading to the request for restriction, explore the needs and circumstances driving the unwelcome behaviour from the perspectives of both parties. Learning how to express needs and meet those needs in a manner that doesn't negatively impact on relationships with family and carers can be an important component of the recovery process. Family or carers may also benefit from support in their relationship and communication with the patient. Supporting the patient to make and participate in decisions about helpful and effective communication and managing personal discomfort when communication needs are not met immediately can be an important part of the recovery process and aligns with the principles of the Mental Health Act and the Charter.

#### **Frequent calls to the police resulting in a request from the police to restrict communication**

Explore the nature of the calls to police. Is the patient seeking to report an unlawful act? Does the person have a complaint about their rights being violated? Does the person feel unsafe?

Supporting the patient's right to make and participate in decisions about the most appropriate course of action aligns with the Mental Health Act and the Charter and is part of the recovery process. Depending on the nature of the calls, the patient may be supported in communicating with the agency that is best positioned to address their concerns. This may be the police, Mental Health Complaints Commissioner, Independent Mental Health Advocacy or other agency.

## **Continuum of restrictions**

Universal restrictions (removing all mobile communication devices – for example, on child and adolescent units or in mental health intensive care units) contravene the Charter and Mental Health Act.

In accordance with the Mental Health Act, restrictions on the right to communicate need to be patient-centred, recovery-focused and be the least restrictive approach possible to protect health, safety and wellbeing.

## Least restrictive through to most restrictive practices for using electronic communication devices

### No restriction

The person can use the electronic communication device at any time, unsupervised.

### Least restrictive

- Electronic devices can be used unsupervised and/or in a private space.
- Each patient keeps their own electronic devices in a personal locker. Access to the device is managed by the patient and documented within the care plan.
- Charging points and wireless headphones are available if ligature concerns require removal of cabled items.
- Telephones, computers or tablets with internet access are available for use by any patient within designated areas. Access will depend on local demand.

### Restrictive

- Patients don't have access to internet or telephones.
- Patients don't have access to a private area to use devices.
- Patients have to ask staff for access to shared telephones.
- Each patient keeps their own electronic devices, but charging cords are confiscated and provision is not made for other means of charging.
- Headphones are confiscated without a wireless alternative being provided.

### Most restrictive

- Patients' devices are confiscated.
- Patients' use of devices is supervised (impinging privacy).

With regard to all the examples provided above, the Mental Health Act provisions need to be met (see Appendix 2).

## E-safety

The online world is part of everyday life for many children and young people. It is a forum where they can play, learn and socialise. Electronic communication also exposes young people to potential risks to their mental health and wellbeing. The Office of the eSafety Commissioner has produced [advice for parents](https://esafety.gov.au/education-resources/iparent) <<https://esafety.gov.au/education-resources/iparent>> on how to minimise the risks associated with using mobile phones, tablet devices and computers, which includes information on social media, screen time, protecting personal information, exposure to inappropriate content, cyberbullying and contact with strangers. This information might also be of helpful to mental health service providers.

# Summary

Patients have the right to communicate. Communication can promote recovery. There may be circumstances when restricting communication may be necessary to protect health, safety, wellbeing and privacy.

Information about using communication devices must be conveyed in a manner in which the individual, according to their specific circumstances, can best understand. Where an individual is represented by a guardian or is a child, information must be provided to the guardian of the individual or the parent or the guardian of the child where the individual or child does not fully understand the information conveyed.

Restrictions to communication need to be patient-centred and recovery-focused and discussed with the patient in a way that supports their right to participate in or make decisions. Restrictions need to be the least restrictive possible to protect health, safety, wellbeing and privacy and include a discussion about alternative options that support communication while protecting the patient and others.

Restrictions need to be monitored and ceased as soon as the reason for the restriction no longer applies. Options for securely storing and registering personal property are recommended, together with access to 'charging stations' (with due consideration to safety of ligatures). Health services are required to adhere to relevant legislation regarding communication and privacy.

## Key measures

The following measures may be helpful to mental health services to audit their compliance with local policy:

1. Designated mental health services have a policy that supports electronic communication in a manner that accords with the principles in this guideline.
2. Staff are aware of the following legislation and how it applies to electronic communication and privacy:
  - Charter of Human Rights and Responsibilities Act (see Appendix 1)
  - Mental Health Act (see Appendix 2)
  - Health Records Act (see Appendix 3)
  - Surveillance Devices Act (see Appendix 4).
3. Inpatient and consumer complaints about electronic communication access and privacy in designated mental health services reduce.

## Further information

In developing, implementing and evaluating local policies and guidelines for mental health services, the department supports recovery-oriented, patient-centred, interdisciplinary collaboration. As such, consultation with patients and others affected by the policy or guideline is a critical step in the process, in alignment with the Mental Health Act.



## Appendix 1: Relevant sections of the Charter of Human Rights and Responsibilities Act

Section	Provisions
Freedom of expression (s. 15)	<p>Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether:</p> <ul style="list-style-type: none"> <li>(a) orally; or</li> <li>(b) in writing; or</li> <li>(c) in print; or</li> <li>(d) by way of art; or</li> <li>(e) in another medium chosen by him or her.</li> </ul> <p>Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary:</p> <ul style="list-style-type: none"> <li>(a) to respect the rights and reputation of other persons; or</li> <li>(b) for the protection of national security, public order, public health or public morality.</li> </ul>
Property rights (s. 20)	A person must not be deprived of his or her property other than in accordance with law.
Recognition and equality before the law (s. 8)	<ol style="list-style-type: none"> <li>1. Every person has the right to recognition as a person before the law.</li> <li>2. Every person has the right to enjoy his or human rights without discrimination.</li> <li>3. Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.</li> </ol>

## Appendix 2: Relevant sections of the Mental Health Act

Section (Part 3, Division 2)	Provisions
Communicate (s. 14)	<p>In relation to an inpatient, means:</p> <ul style="list-style-type: none"> <li>• sending from, or receiving at, a designated mental health service uncensored private communication which may include communication by letter, telephone or electronic means; or</li> <li>• receiving visitors at a designated mental health service at reasonable times, including the Australian legal practitioner or nominated person of the inpatient.</li> </ul>
Right to communicate (s. 15)	<ul style="list-style-type: none"> <li>• An inpatient has a right to communicate lawfully with any person.</li> <li>• An inpatient has a right to communicate with any person for the purpose of seeking legal advice or legal representation.</li> <li>• Members of staff of a designated mental health service must ensure that reasonable steps are taken to assist an inpatient to communicate lawfully with any person.</li> </ul>
Restrictions on right to communicate (s. 16)	<ul style="list-style-type: none"> <li>• An authorised psychiatrist may in writing direct staff at a designated mental health service to restrict an inpatient's right to communicate if the authorised psychiatrist is satisfied that the restriction is reasonably necessary to protect the health, safety and wellbeing of the inpatient or of another person.</li> <li>• A direction cannot be given which restricts an inpatient's right to communicate with: <ul style="list-style-type: none"> <li>– a legal representative; or</li> <li>– the chief psychiatrist; or</li> <li>– the Mental Health Complaints Commissioner; or</li> <li>– the Mental Health Tribunal; or</li> <li>– a community visitor, or</li> <li>– a prescribed person or body.*</li> </ul> </li> </ul> <p>*[The Independent Mental Health Advocacy service is a prescribed body for the purposes of s. 16(2)(f) of the Act.]</p> <ul style="list-style-type: none"> <li>• An authorised psychiatrist must ensure that if he or she directs that an inpatient's right to communicate be restricted, those restrictions are the least restrictive possible to protect the health, safety and wellbeing of the inpatient or of another person.</li> </ul>
Persons to be notified of restriction on inpatient's right to communicate (s. 17)	<ul style="list-style-type: none"> <li>• An authorised psychiatrist who makes a direction to restrict an inpatient's right to communicate must ensure that reasonable steps are taken to inform the inpatient and the following persons in relation to the inpatient about the restriction, and the reason for it: <ul style="list-style-type: none"> <li>– the nominated person;</li> <li>– a guardian;</li> <li>– a carer;</li> <li>– a parent, if the inpatient is under the age of 16 years;</li> <li>– the Secretary to the Department of Health and Human Services, if the inpatient is the subject of a family reunification order or a care by Secretary order.</li> </ul> </li> </ul>
Restriction on right to communicate to be monitored regularly (s. 18)	<ul style="list-style-type: none"> <li>• An authorised psychiatrist who makes a direction to restrict an inpatient's right to communicate must review his or her decision on a regular basis to determine whether the restriction needs to be continued.</li> <li>• If the authorised psychiatrist is satisfied that it is no longer necessary to restrict the inpatient's right to communicate, the authorised psychiatrist must immediately cease the restriction.</li> </ul>

## **Appendix 3: Relevant sections of the Health Records Act**

**Recording of 'health information' using an electronic communication device is subject to the Health Records Act.**

### **Definition**

Health information includes—

(a) information or an opinion about—

(i) the physical, mental or psychological health (at any time) of an individual; or

(ii) a disability (at any time) of an individual; or

(iii) an individual's expressed wishes about the future provision of health services to him or her; or

(iv) a health service provided, or to be provided, to an individual— that is also personal information; or

(b) other personal information collected to provide, or in providing, a health service...

## Appendix 4: Relevant sections of the Surveillance Devices Act

Section	Provisions
Definitions (s. 3)	<p>Listening device: any device capable of being used to overhear, record, monitor or listen to a private conversation or words spoken to or by any person in private conversation (excludes hearing aids).</p> <p>Optical surveillance device: any device capable of being used to record visually or observe a private activity (excludes spectacles).</p> <p>Party:</p> <p>(a) to a private activity, means a person who takes part in the activity;</p> <p>(b) to a private conversation, means a person by or to whom words are spoken in the course of the conversation.</p> <p>Private activity: means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include—</p> <p>(a) an activity carried on outside a building; or</p> <p>(b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.</p> <p>Private conversation: means a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else.</p>
Regulation of installation, use and maintenance of listening devices (s. 6)	<p>A person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation.</p> <p>Penalty: in the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.</p>
Regulation of installation, use and maintenance of optical surveillance (s. 7)	<p>A person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.</p> <p>Penalty: in the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.</p>
Prohibition on communication or publication of private conversations or activities (s. 11)	<p>A person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of a listening device or an optical surveillance device.</p> <p>Penalty: in the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.</p> <p>An exception to this prohibition is where the communication or publication was made with the express or implied consent of each party to the private conversation or private activity.</p> <p>For a comprehensive list that covers other exceptions to this prohibition in specified circumstances, please see s. 11 of the Surveillance Devices Act.</p>